United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 10-1875**
	)	**Issued: July 7, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2010 appellant filed a timely appeal from a May 21, 2010 Office of Workers' Compensation Programs' decision, which denied her request for a review of the written record. She also appealed the Office's March 31, 2010 decision that denied her claim for a recurrence of disability.[1] Pursuant to the Federal Employees' Compensation Act[2] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the nonmerit decision.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a recurrence of disability for the period July 7 to October 24, 2008 causally related to her accepted June 15, 2007 employment injury; and (2) whether the Office properly denied appellant's request for a review of the written record.

[1] The record contains a May 3, 2010 decision; however, appellant did not appeal this decision.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 7, 2007 appellant, then a 41-year-old automation distribution clerk, filed an occupational disease claim for heel spurs due to working on her feet for eight hours a day. She stopped work on June 20, 2007 and returned to work on August 14, 2007 to a modified position as a mail processing clerk. The Office accepted the claim for bilateral heel spurs and bilateral plantar fasciitis based on reports from Dr. Larry Menacker, a podiatrist, who opined that those conditions were caused by appellant's work. On February 6, 2008 appellant filed a claim for a recurrence of disability on November 24, 2007. The Office accepted her recurrence claim on February 21, 2008. Appellant returned to a modified mail processing clerk position on December 3, 2007.[3]

In a July 7, 2008 employing establishment medical unit report, a nurse advised that appellant was not fit for duty the rest of the her shift. In a July 11, 2008 disability certificate, Dr. Menacker stated that she was totally disabled from July 7 to 31, 2008. A July 31, 2008 disability certificate from him diagnosed plantar fasciitis and achilles tendinitis. He recommended physical therapy.

On August 6, 2008 appellant claimed a recurrence of disability beginning July 7, 2008. The employing establishment noted that, after her injury, she returned to a limited-duty position where she cased letters one at a time in a seated position and was not required to stand in excess of one hour. Appellant also filed Form CA-7 disability claims beginning July 8, 2008.

Appellant provided an August 28, 2008 disability certificate from Dr. Menacker who found her totally disabled due to foot and heel pain from September 1 to 19, 2008. On September 2, 2008 Dr. Menacker stated that she had worked with custom molded foot orthoses until July 7, 2008 when she had to leave work with pain in both feet. He noted seeing her on July 11, 2008 for pain and edema. Dr. Menacker indicated that he placed appellant on disability until September 1, 2008 and referred her for a rheumatology consultation and physical therapy. He diagnosed bilateral plantar fasciitis and calcaneal bursitis with heel spurs and advised that she was disabled from August 28 to September 19, 2008. Dr. Menacker noted that appellant's current working situation included standing and carrying weight up to 20 pounds intermittently. He advised that she could not do this. Dr. Menacker noted that, if a sitting position was available for eight hours, "this would be possible." In a September 19, 2008 disability certificate, he diagnosed heel pain and plantar fasciitis and advised that appellant was totally incapacitated from September 19 to November 3, 2008.

The Office referred appellant for a second opinion examination with Dr. Robert Draper, a Board-certified orthopedic surgeon, to determine the nature and extent of her continuing injury-related disability. In a November 5, 2008 report, Dr. Draper noted her history examined her and diagnosed plantar fasciitis and heel spurs of both feet. He related that appellant had already returned to work and opined that he believed that she was capable of performing her regular duty without restrictions. Dr. Draper noted that she might need injections into the feet in the future if

[3] Appellant's modified-duty job was comprised of casing letters one at a time, with two 15-minute breaks, a 15-minute wash up and a 30-minute lunch each day. It allowed for her to sit for seven hours, with walks to her break and lunch areas.

her plantar fasciitis worsened. He recommended that appellant loose weight as her morbid obesity was having an effect on her plantar fasciitis. In a supplemental report dated December 14, 2008, Dr. Draper opined that there was no objective evidence to support a spontaneous worsening of her work-related disability that would cause total disability for work beginning in July 2008.

On January 5, 2009 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Stuart Trager, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve a conflict in opinion between Drs. Menacker and Draper regarding her claim for a recurrence and lost time from work.

In a June 18, 2009 report, Dr Trager noted the history related by appellant, reviewed her medical records and examined her. On examination, appellant was in no acute distress although she reported tenderness bilaterally with palpation of the calcaneus and with compression. Dr. Trager determined that her range of motion in both ankles was normal and there was no deformity of the feet. He explained that there were no significant objective findings, despite mild subjective complaints of tenderness over the region of the calcaneus. Dr. Trager concluded that appellant was not totally disabled from performing her job from July 7 through October 25, 2008 despite increased symptoms. He explained that a trial of limited weight bearing and ambulation would have been possible as opposed to complete disability. Dr. Trager also noted that on November 5, 2008, the date of Dr. Draper's examination, there were no objective findings on examination. He noted that appellant had returned to work and could ambulate for at least an hour and that she should not increase to full-time standing.

In a decision dated June 30, 2009, the Office denied appellant's claim for a recurrence of disability from July 7 to October 24, 2008 based on Dr. Trager's opinion.

On July 4, 2009 appellant requested a review of the written record. In a July 24, 2009 statement, she noted that the decision incorrectly noted that she returned to full duty on June 21, 2007 with no restrictions. Appellant advised that she was totally disabled from June 20 to August 10, 2007. She explained her duties consisted of casing letters and leaning against a rest bar stool for seven hours daily. Appellant stated that, while working, she noticed swelling in her feet and ankles. She spoke to her manager and asked for a chair, so that she could rest her feet as she worked, but this was denied. Appellant explained that she was seen on July 7, 2008, for inflammation of both feet and was immediately sent home. On July 11, 2008 she saw Dr. Menacker who placed her off work and advised her to stay off her feet. Appellant noted that she was placed in a sedentary job on June 18, 2007, when she first complained of her condition and again in August 2007. She also questioned the reports of Drs. Draper and Trager.

In a November 13, 2009 decision, an Office hearing representative set aside the Office's decision. She instructed the Office to obtain a description of the physical requirements of appellant's job at the time of the recurrence, including whether a rest bar stool was used and whether appellant had to place any weight on her feet while using the stool. The hearing representative stated that the updated description of appellant's duties should be included in a statement of accepted facts. She directed that Dr. Trager be asked to provide a reasoned opinion on whether appellant's work-related condition worsened on July 7, 2008 to the point that she could not perform her modified duties.

In a December 3, 2009 note, Dr. Menacker recommended that appellant return to her current sedentary position.

The Office requested a position description from the employing establishment and on December 16, 2009, it received a position description for a mail processing clerk and a rest bar description. The employer noted no undue pressure on the foot as the torso was supported by the rest bar. On December 18, 2009 the employer noted that upon appellant's return to duty she was in a limited duty status, when she was assigned to casing letters one at a time in the primary area. It indicated that appellant had two 15-minute breaks, a 15-minute wash-up for lunch and a 30-minute lunch every day.

In a letter dated January 12, 2010, the Office provided appellant with a description of a rest bar and requested her comment.

On February 1, 2010 the Office received appellant's response which indicated that the rest bar did not provide enough support to keep her off her feet. Appellant noted that "you must keep one foot on the rest bar and the other foot on the floor. The rest bar is not meant to be used as a chair but is meant to be leaned against as a rest stop." She explained that the rest bar did not have back support and, because of constant standing, she began to lose circulation in her feet. Appellant stated that, during her eight-hour shift, she was required to do "quite a bit of walking" as the building was very large. She noted that her primary work area was on the third floor and, when the elevator was out of service, she had to walk up three flights of stairs. Also, the time clock was positioned about 125 feet from the primary section, the ladies restroom was located about 100 feet from the primary section and the break room was located next to the ladies' room. Appellant explained that, if the break room was crowded, she had to walk 200 feet to another break room and the lunchroom was at least two city blocks from the primary section.

On February 17, 2010 the Office provided Dr. Trager with the record, appellant's position description, a photo of the rest bar stool and updated statement of accepted facts.

In a March 19, 2010 report, Dr. Trager noted the history of injury and treatment, revised statement of accepted facts and a photo of the rest bar stool used by appellant. He also reviewed the modified-duty position requirements and noted that the work area was described in detail as being 125 feet from a time clock, 100 feet from the swing (break) room with another break room 200 feet away. Dr. Trager explained that his opinion was unaltered and explained that appellant spent the workday in a seated position and was not required to ambulate throughout the workday. He opined that, it was impossible to conclude that any worsening of the symptoms would be related to work activities. Dr. Trager advised that there was no evidence that appellant could not perform the modified duties of a processing clerk. He reiterated that the job did not require prolonged standing or ambulation. Dr. Trager advised that he did not believe that appellant's condition worsened to the point that she could not perform her modified duties. He opined that there was no clinical evidence provided to support that she could not perform her modified duties for the period July 7 through October 25, 2008.

By decision dated March 31, 2010, the Office denied appellant's claim for a recurrence for the period July 7 to October 23, 2008. It found that Dr. Trager's report was entitled to special weight.

On May 1, 2010 appellant requested a review of the written record.[4]

By decision dated May 21, 2010, the Office denied appellant's request for a review of the written record as the request was not made within 30 days of the March 31, 2010 decision. It also denied the request finding that the matter could equally well be addressed by requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[5] The term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[6] The term also means the inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, except for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties or a reduction-in-force.[7]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[8]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[9] This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[10] The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the

[4] The letter was dated April 30, 2010, but the envelope containing the letter was postmarked on May 1, 2010.

[5] 20 C.F.R. § 10.5(x).

[6] *Id*. at § 10.5(f).

[7] *Supra* note 5.

[8] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[9] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[10] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

Section 8123(a) of the Act provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[12] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[13]

ANALYSIS

Appellant's claim was accepted for bilateral heel spurs and bilateral plantar fasciitis. She claimed a recurrence of total disability for the period July 7 to October 24, 2008. Appellant submitted reports from Dr. Menacker who noted her work-related condition and found her totally disabled during the period at issue. Dr. Draper, the second opinion physician, advised that there was no objective evidence to support disability for the same period. As a conflict existed in the medical opinion evidence between Dr. Menacker and Dr. Draper, regarding the claim for a recurrence and lost time from work, the Office properly referred appellant to Dr. Trager for an impartial medical examination.

In his June 18, 2009 report, Dr Trager noted appellant's history and examined her. His findings included tenderness bilaterally with palpation of the calcaneus and compression. Dr. Trager determined that appellant had normal range of motion in both ankles and no significant objective findings, despite mild subjective complaints of tenderness over the region of the calcaneus. He opined that she was not totally disabled from performing her job from July 7 through October 25, 2008 despite increased symptoms. Dr Trager explained that a trial of limited weight bearing and ambulation would have been possible as opposed to complete disability. Furthermore, he also noted that, as of November 5, 2008, the date of Dr. Draper's examination, there were also no objective examination findings. Dr. Trager also noted that appellant had already returned to work and could ambulate for at least an hour.

After the Office hearing representative directed further development, the Office on February 17, 2010 provided Dr. Trager with appellant's position description and an updated statement of accepted facts and requested clarification regarding whether she was totally disabled for the period at issue.[14] On March 19, 2010 Dr. Trager reviewed the revised statement of

[11] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[12] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan*, 45 ECAB 207, 210 (1993).

[13] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

[14] *See Roger W. Griffith*, 51 ECAB 491(2000) (when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report).

accepted facts, a photo of the rest bar stool used by appellant and the modified-duty position requirements, including the distances in appellant's work area. He noted that the distances she walked in her work area and opined that his opinion was unaltered. Dr Trager advised that appellant spent the workday in a seated position and was not required to ambulate throughout the workday. He concluded that it was impossible to associate any worsening of the symptoms to work activities and determined that there was no evidence that appellant could not perform the modified duties of a processing clerk. Dr Trager also advised that the position did not require prolonged standing or ambulation. He opined that he did not believe that appellant's condition worsened to the point that she could not perform her modified duties and there was no clinical evidence to support that she could not perform her modified duties for the period July 7 through October 25, 2008.

The Board finds that Dr. Trager's report is based on a proper factual background and sufficiently well rationalized such that it is entitled to special weight and establishes that appellant had no disability causally related to her accepted condition for the period July 7 to October 23, 2008. Consequently, appellant did not meet her burden of proof to establish a recurrence of disability for the claimed period.

The Board also notes that appellant alleged that the rest bar stool which she used did not provide adequate support for her feet. To the extent that appellant is alleging that this is a change in the nature and extent of her light-duty requirements, she has not provided evidence to support this claim. The modified-position requirements for her included that she was assigned to primary casing letters one at a time, with two 15-minute breaks, a 15-minute wash up for lunch and a 30-minute lunch everyday. The employer indicated that appellant's job was consistent with her restrictions and that she never stood for more than an hour. The Board finds that she has not provided evidence showing a change in the nature and extent of the light-duty job requirements.

On appeal, appellant again asserted that the rest bar stool did not allow her to sit. She also questioned the report of the impartial medical examiner. However, as noted above, Dr. Trager was aware of the rest bar stool and appellant's position requirements and as explained his opinion is entitled to special weight. Appellant did not submit any evidence before the Office to establish that the opinion of Dr. Trager should not be afforded special weight.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act,[15] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the

[15] 5 U.S.C. § 8124(b)(1).

request is filed within the requisite 30 days.[16] When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was "a review of an adverse decision by a hearing representative" and that a claimant could choose between two formats: an oral hearing or a review of the written record.[17] These regulations also provide that the request for either type of hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[18]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[19] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[20]

ANALYSIS -- ISSUE 2

In its May 21, 2010 decision, the Office denied appellant's request for a review of the written record since her request, postmarked May 1, 2010, was not made within 30 days of its March 31, 2010 decision. The Board finds that, as her request for a review of the written record was postmarked May 1, 2010 and was thus made more than 30 days after the date of issuance of the Office's March 31, 2010 decision, the Office correctly found that she was not entitled to a review of the written record as a matter of right.

While the Office also has the discretionary power to grant a request for a review of the written record when a claimant is not entitled to the review as a matter of right, the Office, in its May 1, 2010 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[21] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion.

[16] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[17] 20 C.F.R. § 10.615.

[18] *Id*. at § 10.616. *See Leona B. Jacobs*, 55 ECAB 753 (2004).

[19] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[20] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[21] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that appellant has not established a recurrence of disability for the period July 7 to October 24, 2008 causally related to her accepted June 15, 2007 employment injury. The Board also finds that the Office properly denied her request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 21 and March 31, 2010 are affirmed.

Issued: July 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board